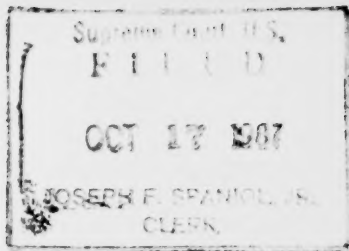


87-680



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. _____

JOSEPH A. MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STANLEY W. GREENFIELD,
Counsel for Petitioner,
Joseph A. Miller

GREENFIELD & ASSOCIATES
728 Fifth Avenue
Pittsburgh, Pennsylvania 15219
Telephone: 412-261-4466

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the split in the Circuits should be resolved to determine if the element of extortion, necessary to confer federal jurisdiction under the Hobbs Act, is made out when the alleged victims pay unsolicited personal money to obtain a job to which they had no right or entitlement.
- II. Whether the split in the Circuits should be resolved to determine if the element of interstate commerce necessary to confer federal jurisdiction under the Hobbs Act, is made out when the alleged victims of the extortion payment, were private individuals, who paid personal monies to obtain jobs to which they were not otherwise entitled.



**PARTIES TO THIS PROCEEDING
IN THE COURT BELOW**

This action, as filed in the United States Court of Appeals for the Third Circuit, was styled United States of America v. Joseph A. Miller, Appellant, at No. 87-3107.

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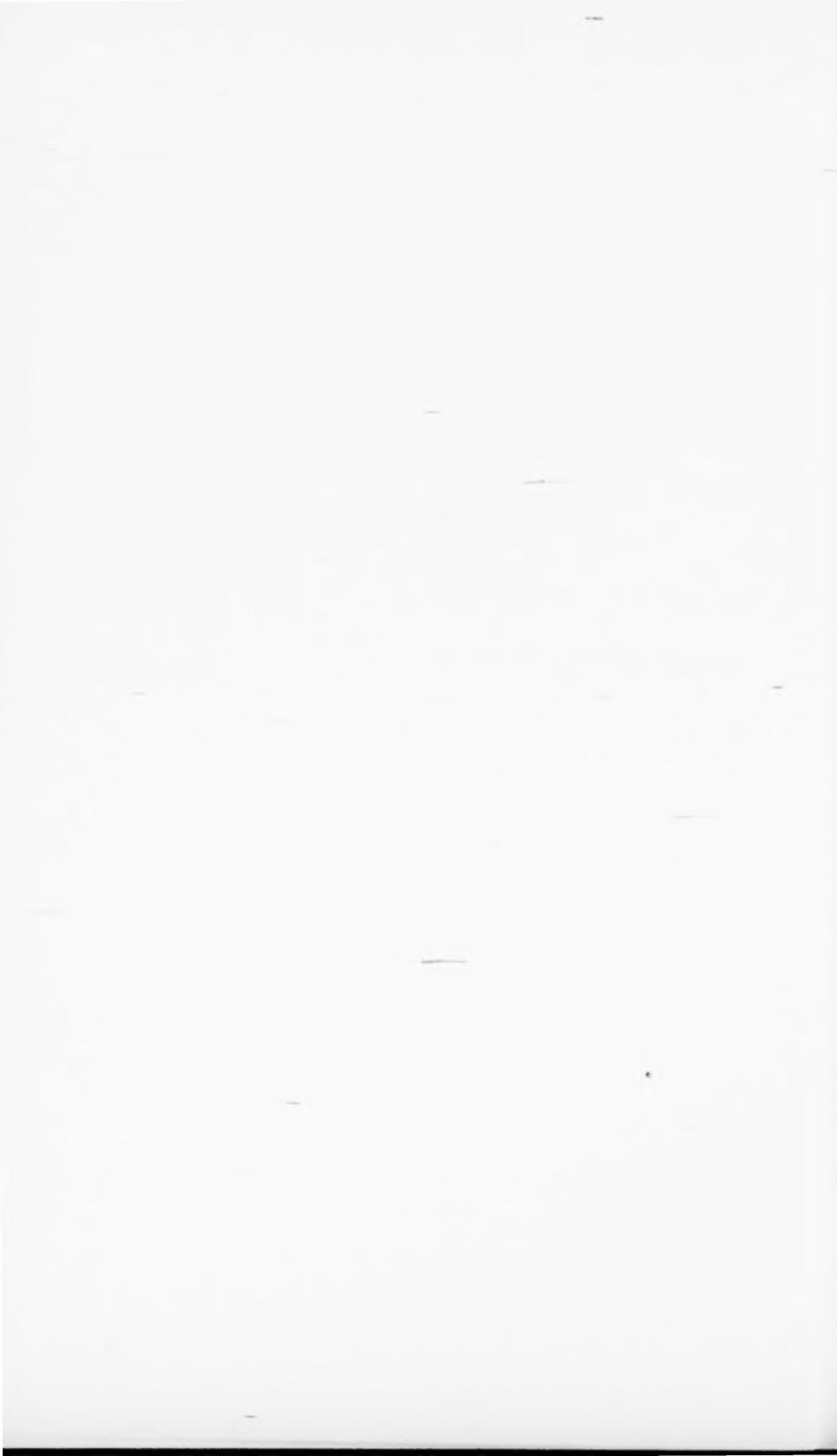


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OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued an Opinion and Judgment on August 19, 1987. A copy of the Opinion is contained in the Appendix at pp. 1a-4a. A copy of the Judgment is contained in the Appendix at pp. 5a-6a.



STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on August 19, 1987.

The Judgment of the United States Court of Appeals for the Third Circuit is thus final with respect to the issues presented here. There exists a division of opinion among the Courts of Appeals for the various circuits. The issues are therefore ripe for review.

The jurisdiction of the Supreme Court of the United States is invoked under Title 28, -United States Code Section 1254 (1).



STATUTORY PROVISIONS INVOLVED IN THIS CASE

Title 18, United States Code, Section 1951

provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

- (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
- (2) The term "extortion" means the obtaining of property from



another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.



STATEMENT OF THE CASE

Procedural

On October 2, 1986 a federal Grand Jury for the Western District of Pennsylvania handed down a ten count indictment against Petitioner Joseph Miller, ("Petitioner") for accepting money from private individuals seeking work assignments at the grocery warehouse, where Petitioner was employed, in violation of the Federal Hobbs Act, 18 United States Code Section 1951.

After a jury trial before the Honorable Donald E. Ziegler, District Judge, Western District of Pennsylvania, on December 17, 1986, Petitioner was convicted of eight of ten counts and acquitted on two counts of Hobbs Act violations. On January 30, 1987, the District Court sentenced Petitioner to a two year prison term at a Level I Federal Institution.



On August 19, 1987 Petitioner appealed his conviction to the United States Court of Appeals for the Third Circuit and that Court affirmed his conviction. In his Appeal Petitioner requested reversal of his conviction arguing that a split among the Circuits existed upon the issues raised in this Petition for Writ of Certiorari. The Third Circuit rejected Petitioner's claims without addressing one of the issues which Petitioner claims has resulted in a split among the Circuits. This Petition followed.

Background

Joseph Miller was the shop steward at OK Grocery during the relevant indictment period at its dry goods warehouse in Pittsburgh.

From time to time as required by work demands, extra loaders and drivers were required to be hired from an available pool of part-time loaders and drivers. Petitioner and other union



officials managed the process for calling these workers for these temporary assignments, upon the request of OK Grocery officials.

The process for calling part-time workers to work was a straightforward one. The OK Grocery dispatcher would inform either Petitioner or another union official, during Petitioner's absence, as to the number of extra loaders and drivers needed. Petitioner or a union official would then contact the individuals available for work.

On December 17, 1986, the Petitioner was tried by a jury before the Honorable Donald E. Ziegler. At trial the government offered the testimony of four witnesses, each of whom testified that they paid Petitioner in order to receive part-time work.

Each of the government witnesses testified that they initiated the payments in the belief that it would enhance or assure the opportunity to be

called out to work. The three witnesses (Long, Gallagher, McPaul), testifying in support of the Counts in the Indictment, conceded that it was they who often approached Petitioner seeking to improve their economic positions. It was never alleged by any of the witnesses that they, as bribe-givers, ever feared losing something, nor did they ever testify that they felt that Petitioner had the power to take away something they already had.

At no time during the trial did the government offer any evidence that Petitioner acted negatively toward anyone who failed to pay him money. The substance of the government's position was that persons who did pay the Petitioner were assisted by him in gaining full-time employment for themselves or their relatives. Also, at no time during the trial did they offer any evidence that OK Grocery paid extortion monies, or that their



ability to purchase goods in interstate commerce had been depleted.

After presentation of all the evidence the jury convicted Petitioner on eight of the ten counts of the Indictment, and acquitted him on the other two counts. Petitioner then appealed to the Third Circuit who affirmed his conviction while not addressing the merits of issue presented in this Petition for Writ of Certiorari.

After serving eight (8) months of a two year prison sentence Petitioner was released from prison on October 12, 1987. While the Petitioner is no longer incarcerated he will continue to suffer serious deprivations of personal liberty as a result of his conviction for extortion. These deprivations include, but are not limited too, Petitioner's inability to own or possess a firearm, his inability to hold union office, the denial of accrued pension, health, and welfare benefits, and the severe impairment of

Petitioner's employment marketability, all as a result of what this Petition contends was an erroneous felony conviction.

**REASONS RELIED UPON FOR THE
ALLOWANCE OF THE WRIT**

- I. THE SPLIT IN THE CIRCUITS SHOULD BE RESOLVED TO DETERMINE IF THE ELEMENT OF EXTORTION, NECESSARY TO CONFER FEDERAL JURISDICTION UNDER THE HOBBS ACT, IS MADE OUT WHEN THE ALLEGED VICTIMS PAY UNSOLICITED PERSONAL MONEY TO OBTAIN A JOB TO WHICH THEY HAD NO RIGHT OR ENTITLEMENT.

Petitioner here was a union official charged with accepting personal money from three union members to place those members' names on a preferred list for calling part-time workers in for extra work to OK Grocery, where they were not otherwise employed, from time to time as required by work demands. A fourth had money paid by his father to the Petitioner to secure placement of his name on the preferred list.

Each witness testified that he sought out the Petitioner. In each of the four cases, the union



member (or his son) was indisputably not entitled to placement on the preferred list otherwise.

The Hobbs Act, 18 United States Code Section 1951 (b)(2), provides in relevant part:

The term extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The Third Circuit has consistently held that unless a public official is the Defendant involved, the government must prove that the alleged victims parted with their property based on fear of economic harm. United States v. Addonizio, 451 F.2d 49 (3rd Cir.1972); United States v. Jannotti, 673 F.2d 578 (3rd Cir. 1982). In the context of job-selling schemes the fear of economic harm has been defined to mean a reasonable fear that the bribee would exploit such power as he had to diminish the briber's employment opportunity unless the victim paid money. See, e.g., United States



v. Rastelli, 551 F.2d 902 (2d Cir.), cert. denied, 434 U.S. 831 (1977).

On April 24, 1987, the United States Court of Appeals for the Second Circuit, sitting en banc, in United States v. Capo, 817 F.2d 947 (2d Cir. 1987) reversed a three-judge panel, and held as a matter of law that the selling of preference in job placement to persons who are not entitled to such a preference as a matter of right constitutes commercial bribery and not extortion sufficient to confer federal subject-matter jurisdiction under the Hobbs Act.

The facts of Capo and the instant case are virtually on all fours. In Capo, the defendants were convicted under the Hobbs Act for a job-selling scheme in connection with employment at Eastman-Kodak, in Rochester, New York.

The three judge panel held that fear of economic loss was made out since the "victims",

as in the instant case, paid because they thought that paying the bribe was their only chance of being hired at Kodak. United States v. Capo, 791 F.2d 1054, 1064-65, rev'd, 817 F.2d 947 (2d Cir. 1987), (hereinafter, Capo I). In reversing, the Second Circuit en banc held that even if true,

. . . it is not enough to establish extortion by wrongful use of fear of economic loss. Without evidence that the "victims" feared that defendants would impair their prospects of being hired, all the panel majority's observation shows is that they were unqualified, or were subjected to difficult economic circumstances, or for some other reason were unlikely to succeed through Kodak's normal hiring channels.

United States v. Capo, 817 F.2d at 953, (hereinafter, Capo II).

Since the Third Circuit did not articulate upon what basis it found fear of economic harm in this matter, it must be presumed, as in Capo I, supra, that the fear of economic harm was made out

because the "victims" thought that paying the bribe was their only chance of getting a job.

The Second Circuit, en banc, articulated a two-part alternative test to determine if, in the context of a job-selling scheme, fear of economic loss was made out.

First, there was no evidence that any defendant did, in fact, negatively influence any hiring decision, or even attempt to do so. When defendants did intervene in Kodak's hiring it was only to assist these "victims".

Furthermore, review of the trial transcript reveals that not one witness testified to any fear that nonpayment would result in one of the defendants adversely affecting his or her chances for a job at Kodak; indeed most of the "victims" testified that they had no such fear, while the others simply were not asked.

United States v. Capo, II, 817 F.2d at 952.

Under Capo II, fear of economic loss is made out in a job-selling scheme when either the bribee negatively influences the job prospects of persons who do not pay, or when the briber reasonably fears

that the bribee will negatively influence his job prospects if the bribe is not paid.

The much broader test of Capo I, and presumably, of the Third Circuit, would bring within the ambit of federal jurisdiction under the Hobbs Act¹, every instance of commercial bribery in a job selling context.

As the Capo II court noted, bribery and extortion, while not neatly separable, are distinct crimes. Both the payor and the recipient of a bribe are guilty of a crime, while under extortion statutes, only the extortionist has broken the law. Bribery is made out when the payment is solely intended to secure an otherwise unsecured result and there is no evidence that the payor feared

1. Since the Petitioner was not charged under the Travel Act, 18 U.S.C. § 1952, it is not necessary to consider whether the acts charged are within that federal statute.



some negative intervention for nonpayment by the payee. United States v. Capo, II, 817 F.2d at 954.

The legislative history of the Hobbs Act indicates that it was not the intent of congress to encompass state-law commercial bribery within the purview of that statute. By holding that fear of economic loss is made out under the facts of this case, the Third Circuit has extended federal jurisdiction into an area previously the province of the states.

Unless this Court defines the proper test to be applied to a job-selling scheme such as the one alleged herein and in Capo, then even-handed justice will depend on the fortuity of the Circuit in which one lives or the alleged offense occurs.



II. THE SPLIT IN THE CIRCUITS
SHOULD BE RESOLVED TO
DETERMINE IF THE ELEMENT
OF INTERSTATE COMMERCE
NECESSARY TO CONFER
FEDERAL JURISDICTION UNDER
THE HOBBS ACT, IS MADE OUT
WHEN THE ALLEGED VICTIMS
OF THE EXTORTION PAYMENT,
WERE PRIVATE INDIVIDUALS,
WHO PAID PERSONAL MONIES
TO OBTAIN JOBS TO WHICH
THEY WERE NOT OTHERWISE
ENTITLED.

The Third Circuit affirmed Petitioner's
conviction by Memorandum Opinion (Appendix, 1a-
4a), by holding that:

Even payments made indirectly on
behalf of truck drivers for work
opportunity have a potential effect on
interstate commerce.

(Memorandum Opinion of the Court at page 2),
Appendix p. 3a).

In citing United States v. Local 560 of the
International Brotherhood of Teamsters, 780 F.2d
267, 281, n.15 (3d Cir. 1985), the Third Circuit
apparently accepts Petitioner's contention that the



alleged "extortion" payments had no effect on OK Grocery's business,² but that these payments "did, however, effect the return the truck drivers received for their labor in interstate commerce.

The Third Circuit's interpretation of the interstate commerce requirement of the Hobbs Act directly conflicts with the Seventh Circuit's interpretation of this requirement as set out in United States v. Mattson, 671 F.2d 1020 (7th Cir. 1982). In Mattson, the Seventh Circuit detailed two methods for showing an affect on interstate

2. The Indictment charged in relevant part that:

JOSEPH A. MILLER did obtain from . . ., with his consent, certain property, namely . . ., in United States currency, in return for employment for his son, . . ., at the OK Grocery, which was then engaged in commerce, such consent having been induced by fear of economic harm and loss.

commerce as required by the Hobbs Act and held that:

The victim in this case was an individual who had no connection with interstate commerce at all, but whose only connection was with a business which was engaged in interstate commerce. Thus, to find an affect on interstate commerce we would be required not only to consider indirect affects within a single business entity, but also affects arising from the business entity's relationship with an employee not engaged in interstate commerce.

Mattson, supra at 1025.

Mattson and its progeny thus find no impact on interstate commerce where the victim of the extortion is an individual using his own money for payoffs, as distinguished from a business making the same payments. Mattson, supra; United States v. Kaye, 593 F. Supp. 193, 197 (1984).

Contrary to the Seventh Circuit's interpretation, the Third Circuit's Memorandum Opinion, supra, found that the alleged extortionate



payments by the individual truck drivers did, in fact, have an affect on interstate commerce, thus conferring jurisdiction under the Hobbs Act.

As Petitioner contended at trial, OK Grocery was not the "victim", as it never advanced any of its monies to Petitioner, nor did it reimburse any of the individuals allegedly paying Petitioner. In the instant case, the interstate commerce activities of OK Grocery were not related to the alleged extortion of monies from private individuals whose money was involved. Moreover, it was apparent from testimony at trial that OK Grocery would have continued to purchase out of state supplies to be delivered by a common carrier or otherwise, regardless of whether Petitioner had ever assigned any of the alleged "victims" for pay or not.

The facts of this case are indistinguishable from those of Mattson in that each involved individuals tendering monies to alleged



"extortionists" in exchange for work related favors. In neither case was business money used to satisfy the alleged extortion demands.

If, as the Mattson Court said, a sufficient nexus with interstate commerce can be found in a situation such as there, and, as we contend, here,

we are unable to conceive of an extortionate transaction which would not be punishable under the Hobbs Act. To hold on the facts of this case would mean that the extortion of money from any individual in our society could arguably affect interstate commerce eventually.

Mattson, supra, at 1025.

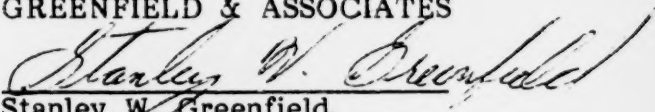


CONCLUSION

The Court should grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit 1) to resolve the different standards in the Circuits with respect to the definition of extortion as an element of the Hobbs Act; and 2) to resolve the different standards in the Circuits with respect to nexus between interstate commerce and the alleged "victims" of the extortion.

Respectfully submitted,

GREENFIELD & ASSOCIATES


Stanley W. Greenfield,
Attorney for Petitioner,
Joseph A. Miller

728 Fifth Avenue
Pittsburgh, Pennsylvania 15219
Telephone: (412) 261-4466



CERTIFICATE OF SERVICE

COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF ALLEGHENY) SS:

I hereby certify that on the 16th day of October, 1987, three (3) true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, were served on each of the individuals and in the manner indicated below, which service satisfies the requirements of Rule 28 of the United States Supreme Court Rules.

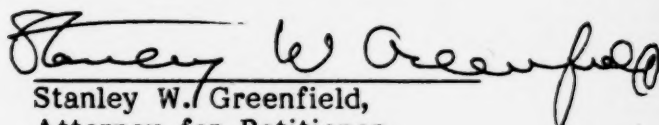
SERVICE BY FIRST CLASS, UNITED STATES MAIL, POSTAGE PREPAID:

1. Charles Fried
SOLICITOR GENERAL
United States Department of Justice
Room 5143
Main Justice Building
Washington, D.C. 20530

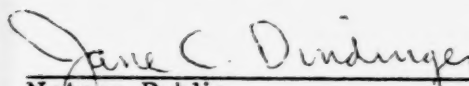


2. Paul J. Brysh, Esquire
Assistant United States Attorney
Western District of Pennsylvania
633 U. S. Post Office and Courthouse
Seventh Avenue and Grant Street
Pittsburgh, Pennsylvania 15219

GREENFIELD & ASSOCIATES


Stanley W. Greenfield,
Attorney for Petitioner,
Joseph A. Miller

SWORN to and subscribed before me
this 16th day of October, 1987.


Notary Public

My Commission Expires:

JANE C. DINDINGER, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES JUNE 7, 1988
Member, Pennsylvania Association of Notaries

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-3107

UNITED STATES OF AMERICA

v.

JOSEPH A. MILLER,
Appellant.

ON APPEAL FROM THE UNITED STATES
— DISTRICT COURT FOR THE —
WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Crm. No. 86-00223)

District Judge: Hon. Donald E. Ziegler

Submitted Under Third Circuit Rule 12 (6)
August 19, 1987

Before: GIBBONS, Chief Judge, WEISS, Circuit
Judge and KELLY, District Judge*

MEMORANDUM OPINION OF THE COURT
August 19, 1987

/s/ John J. Gibbons
GIBBONS, Chief Judge:

Joseph Miller, the Union Steward for International

*Hon. James McGirr Kelly, United States District
Judge for the Eastern District of Pennsylvania,
sitting by designation.



Brotherhood of Teamsters, Local 249, appeals from a judgment of sentence following his conviction on eight counts of violating the Hobbs Act, 18 U.S.C. § 1951 (1982). Miller contends that a judgment of acquittal should have been entered because the United States failed to prove a nexus between the extortionate payments in issue and interstate commerce. Alternatively he contends that he is entitled to a new trial because the court erred in admitting evidence of other crimes.

The evidence disclosed that part-time truck drivers for OK Grocery, and in one instance the father of a part-time driver, made payments to Miller in order to secure work opportunity. Miller contends that these payments had no effect on OK Grocery's business. It did, however, effect the return the truck drivers received for their labor in



interstate commerce. See United States v. Local 560 of the International Brotherhood of Teamsters, 780 F.2d 267, 281, n. 15 (3d Cir. 1985). Even payments made indirectly on behalf of truck drivers for work opportunity have a potential effect on interstate commerce.

The trial court admitted evidence that Miller received extortionate payments from drivers not named in the indictment, at a time beyond the statute of limitations. Miller contends that this evidence, which arguably admissible under Fed. R. Evid. 404 (b) to show motive, opportunity, intent, plan, knowledge, or absence of mistake or accident, should have been excluded pursuant to Fed. R. Evid. 403. The trial court applied the balancing required by United States v. Cook, 538 F. 2d 1000 (3d Cir. 1976). We find no abuse of discretion in the court's ruling in favor of admission.



The judgment appealed from will therefore be affirmed.

TO THE CLERK OF THE COURT

/s/ John J. Gibbons
Chief Judge



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-3107

UNITED STATES OF AMERICA

v.

JOSEPH A. MILLER,
Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Criminal No. 86-00223
District Judge: Hon. Donald E. Ziegler

Before: GIBBONS, Chief Judge,
WEIS, Circuit Judge
and KELLY, District Judge

JUDGMENT

This cause came on to be heard on the

*Hon. James McGirr Kelly, United States District
Judge for the Eastern District of Pennsylvania,
sitting by designation.



record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on August 19, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the District Court entered January 30, 1986 be and the same is hereby affirmed.

Attest:

/s/Sally Mrvos
Chief Judge

August 19, 1987

Certified as a true copy and issued in lieu of a formal mandate on September 10, 1987.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit